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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. 261 [redacted]

SPENCER H. ROBLEY, JR.
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

SPENCER H. ROBLEY, JR.
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1970; Petition for Rehearing denied May 18, 1970. See Appendix B to this Petition.

The Petition for Writ of Certiorari is filed within the required thirty days time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

Constitutional questions are presented, involving both the First and Fifth Amendments: May an administrative agency validly promulgate a regulation [32 C.F.R. § 1625.2] that creates a deadline for filing information of a new status (in this case a status involving religion and conscientious belief) despite the absence of any time limitation set by the Act of Congress?

This was raised in the trial court, by Motion for Judgment of Acquittal and in the Court of Appeals, by briefing.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. § 1625.2 and § 1622.30. They are set forth in Appendix C.

5. STATEMENT OF THE CASE

The indictment charged Robley with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT. 2].

Robley pleaded "not guilty" and was tried by the Honorable E. Avery Crary, District Judge, sitting alone without a jury. He was found guilty and given a three year sentence.

6. THE FACTS

The facts are found in two places: (1) The complete Selective Service System file of the appellant[1] and (2) the oral testimony in the trial court found in the Reporter's Transcript of Proceedings.[2]

Petitioner registered with the Selective Service System on March 23, 1961 [Ex. 2]. He was classified III-A on September 16, 1964. He was reclassified I-A on October 12, 1966. On April 12, 1967, he was declared delinquent for failure to appear for the armed forces physical examination [Ex. 11]. On March 7, 1968, information was presented to the local board by Robley (by his letter of March 4, 1968) which qualified him for the III-A hardship classification [Ex. 60]. The board did not take action on this matter [RT. 42].

Petitioner was sent an induction order. An induction order which, it was contended at the trial, was invalid [RT. 51-56]. On June 6, 1968 he refused induction [Ex. 11].

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1. This file, Government's Exhibit 1, is pencil paginated at the bottom of each sheet and is hereafter referred to by sheet number.

2. RT. refers to the Reporter's Transcript of Record.

Petitioner on March 12, 1964 signed the form declaring that he was a conscientious objector to war and military service [Ex. 7], and, when his thoughts finally crystalized as a conscientious objector he went to his local board, obtained SSS Form 150, filled it out and filed it with his local board in October 1968 [RT. 30-31].

7. REASONS FOR GRANTING WRIT

A national decision is required on the constitutional problems present, ones that involve whether the Act of Congress giving conscientious objectors a draft status, and without time limitation for presentation, may be thwarted by an administrative regulation that creates a deadline for presentation of a new status.

Also involved is a consideration of the "in limbo" problem where one agency (the Selective Service System) will not consider a claim of new status presented to it after its deadline, the Order to Report for Induction, and the regulation of another linked-in-the-processing agency (the United States Army) will "not entertain" an application for separation, based on the status of conscientious objection, where such status had been presented to the Selective Service System.

8. ARGUMENT

I

Tension Between Act and Agency Regulation

Congress explicitly established conscientious objection and nowhere, even by implication, set a deadline for its presentation.

Petitioner refers to the dilemma involved in a confrontation between an Act of Congress and an agency regulation.

Congress by law clearly intended to expeditiously raise an army. But it is the will of Congress, by unequivocal expression in the law, that conscientious objectors should be exempt.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is true, as an early Supreme Court decision puts it "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations." *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175 (1932).

Yet one of the settled portions of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that branch of government to any other body or authority. As the Supreme Court stated it: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).

But the President may prescribe administrative rules upon Congressional authorization. *United States* v. *Grimaud*, 220 U.S. 506, 521, 31 S.Ct. 480, 484, 55 L.Ed. 563 (1911). It is true in modern times that this doctrine has

been widening, for as Mr. Justice Douglas declared, with only Mr. Justice McReynolds dissenting: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940).

Yet despite the widening it is still a clear principle of constitutional law that the President may not legislate contrary to Congressional law.

As the Supreme Court declared in *Koshland* v. *Helvering,* 56 S.Ct. 767, 298 U.S. 441, 80 L.Ed. 1268, 105 A.L.R. 756 (1936): "Where provisions of a statute are unambiguous and its directions specific, the statute cannot be amended by regulation." For, as the Court pointed out, "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Dixon* v. *United States,* 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965). Speaking for the Court at 1304, Mr. Justice Brennan then went on to declare: "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Pursuant to the delegated powers in the Act, regulations were adopted for administrative procedures. 10 (b) 1 of the Act provides: "The President is authorized—to prescribe the necessary rules and regulations to carry out the provisions of this title."

The regulations, promulgated by the President, provide procedures for determining the merit of claims for deferment. Those procedures provide that the registrant

may ask for a face to face confrontation with the local board and, if it rejects his claim, for a review of his file by the State Appeal Board. A short cut, one that does not offer him either, or both, of these avenues of relief is unlawful.

It is submitted that the provision of the Act concerning conscientious objectors is unambiguous and its direction specific.

A pertinent restatement of it is found in the Department of Defense directive to all the eleven armed services:

> ". . . the Congress, as indicated by provisions of P.L. 90-40 (reference (c)) and related statutes, has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces. . . ." [DoD Directive No. 1300.6]

It is clear that Congress put no time limit on the presentation of such a claim. Any administrative inconvenience that results from "late" filing is to be remedied by Congress, not by the agency. Every agency, and this one, certainly has administrative inconveniences and frustrations. There is no legal excuse for short cuts to avoid them, in the face of Congressional intent.

Neither the President nor his representative can nullify the will of Congress by prescribing regulations which are contrary to the intent of the statute enacted by Congress.

In regards to conscientious objectors, it is submitted that 32 C.F.R. § 1625.2 is contrary to Congressional will as enacted into law and hence null and void.

Congressional policy against requiring combatant training and service of those conscientiously opposed to par-

ticipation in war is one of long standing. *Seeger* v. *United States*, 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty.

Although we are not here dealing with an *Ehlert*-type situation the rationale is much the same: the conflict between the "open-end" Act of Congress and the deadline setting agency regulation.

The majority opinion in the "controlling" case, *Ehlert* v. *United States*, 9 Cir., 1970, ... F.2d ....., 2 SSLR 3495, recognizes that many of the Courts of Appeals differ on this point and states

> "Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States* v. *Sandbank*, 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States* v. *Gearey*, 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene* v. *United States*, 266 F.2d 378 (10th Cir. 1959)."

The minority opinion in *Ehlert*, Judge Merrill speaking, with the four other dissenting circuit judges concluded that "I would hold the regulation to be contrary to statute and invalid." The majority had held that a change in a registrant's status (after he had received an induction order) to that of a conscientious objector was a situation over which registrant had control, *but it did not concern itself at all* with the point we advance.

As Judge Merrill stated in *Ehlert*:

> "Legislation creating this exemption from military service, 50 U.S.C. App. § 456 (j), provides for

> no such limitation. The enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself, and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service."

Concerning conscientious objection, it is clear that the Congressional statute states and defines the rights of the registrant and fixes a standard by which such rights are to be measured.

The regulations constitute a step in the administrative process, but they cannot alter the Congressional will as expressed by statute. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U.S. 129, 56 S.Ct. 391, 80 L.Ed.2d 528 (1936); *Dixon* v. *United States,* 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965).

The President himself recognizes the authority of Congress in this regard. For example, under the Military Selective Service Act of 1967, the President realized he had not been given power to institute a random selection system to draft registrants into the armed services. Possibly because such a matter involved *all* registrants (and conscientious objection only a few). In any event the President requested Congress to change the law. The President recognized that the wise and legal course was not to change the law by new regulations. Congress passed the Selective Service Amendment Act of 1969 (P.L. 91-124) and the President signed it on November 26, 1969.

Another example to prove the point was the seizure of the steel mills of the country by President Truman on April 8, 1952, in a labor dispute. In that situation the Supreme Court held that the President could not act contrary to Congressional will. The President had no power to seize the mills without Congressional authorization. When Congress passed the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. The power that the President exercised was lawmaking power, which the Constitution vests in the Congress alone. It is the function of the President to take care that the laws be faithfully executed, not act contrary to Congressional will as expressed by law.[3] *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

In regards to exemption of conscientious objection, the will of Congress is clear. It is stated by a clear, definite, unambiguous statute.

We have the same situation in this draft case.

Once the will of Congress is expressed by law, the President can implement that will by rules and regulations. He cannot, by regulation, legislate contrary to that will.

It may be true, as Professor Kenneth Davis has pointed out (*Administrative Law Treatise*, Volume 1, Section 5:09), that at certain times ascertainment of the intention of Congress in regards to a statute may be impossible. But such is not the case here.

In regards to conscientious objectors the language of the law is clear. The President by regulation cannot

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3. Mr. Justice Frankfurter stated at page 602: "Congress has expressed its will to withhold this power [of seizure] from the President *as though it had said so* in so many words." [Italics supplied].

change substantially what Congress has willed by law. In regards to conscientious objector registrants 32 C.F.R. § 1625.2 is contrary to the statute and hence invalid.

II

Some Draft Cases Already Support the View That This Act Must Take Precedence Over § 1625.2

There is no need to recite *Gearey* or similar opinions for they are listed in the majority's slip opinion, on page 333, *Ehlert* v. *United States*, 9 Cir., 1970, 422 F.2d 332.

One not listed gives the rationale well:

The facts of it are that on January 29, 1951, a registrant named Clark mailed to the board a request for appeal from their ruling on his claim. This notice was received by the board on February 3, 1951. Prior thereto, on February 2, 1951, the board mailed a notice to the defendant to report for induction [p. 614].

The opinion says:

"Although the regulations, literally construed, tend to support this position, we think that a right of appeal does exist in this case. An Act of Congress creates that right without any express limitation, and it seems unreasonable to hold that Congress intended the right of appeal to exist only where the claim for exemption as a conscientious objector was considered at the time of the initial classification. This would be the result in effect if we accept the Government's contention. The right of appeal would exist only in cases where the claim is considered at the time of the initial classification; in all other instances the local board would be able to determine whether a claimant should have an appeal merely by framing its order as a refusal to reopen the original classification rather than an order granting a reopening of the classification on which a hearing would be held and

the right of appeal from an adverse determination granted." *United States* v. *Clark*, W.D.Pa., 1952, 105 F.Supp. 613, 615.

III

The Denials of Due Process

A. The I-O Claim.

In a recent case the Second Circuit Court of Appeals stated:

> ". . . despite the inconvenience occasioned by the reopening of a registrant's classification after he has been called for induction, a registrant whose conscientious objections crystallize only after the issuance of an induction order and who presents his request for classification as a conscientious objector at the earliest possible time, is entitled to have his classification reopened and considered anew." *United State* v. *Holmes*, No. 32788 (C.A. 2, Jan. 12, 1970).

Petitioner Robley presented his prima facie claim for his conscientious objector status at the earliest possible time after his crystallization. Not only did the Selective Service System local board refuse to reopen, but it did not invite petitioner to appear before it to discuss his claim.

The policy of the Selective Service System is that if the local board determines that it cannot grant a I-O claim then "the local board should invite or request the registrant to meet with it for an interview. . . ." *Local Board Memorandum No. 41* (Issued Nov. 30, 1951, Amended July 30, 1968). This petitioner's local board did not do.

Surely to recommend that the local boards grant interviews to I-O claimants and then to permit certain boards not to grant interviews violates due process of law and is contrary to the Fifth Amendment.

As the Court stated in *MacMurray* v. *United States*, 9 Cir., 1954, 330 F.2d 928 at 932, 934:

> "Denial of inquiry and hearing is fatal to the validity of an induction order unless it appears beyond doubt that the registrant's objections are based upon, in the words of 5456 (j) 'essentially political, sociological, or philosophical views or a merely personal moral code'."

The Court then concluded:

> "Since appellant was denied a hearing with respect to the character of his objections on a record which did not on its face establish clearly and incontrovertibly that his objections were nonreligious in character his conviction cannot stand."

This is the position of petitioner in the matter before this court.

Several of the Circuit Courts are in agreement with petitioner's contentions. In *United States* v. *Holmes*, supra, it was held by the Second Circuit that a registrant's oral claim of conscientious objection status on the very date of induction at the induction station must be considered by the local board. The Seventh Circuit Court of Appeals held that due process was denied when the local board did not consider the conscientious objector claim of a registrant filed one day prior to his induction date. *United States* v. *Shermeister*, No. 17482 (C.A. 7, Jan. 21, 1970), 2 SSLR 3492.

Some courts have held that for the local board to consider a conscientious objector claim submitted by a registrant without reopening violates due process. As Chief Judge J. Nichol stated in *United States* v. *Melrose*, CR68-124S (D.S.D., Dec. 4, 1969), 2 SSLR 3482:

> "By holding that it did not reopen the defendant's classification, the board precluded him from ap-

pealing its decision, as the determination not to reopen is not appealable. . . . However, a reopening and consequent determination of the claim on the merits gives the defendant the right to appear before the board thereafter and to appeal the decision to the administrative appeal boards. Davis v. United States, supra. It is apparent, therefore, that the determination not to reopen is in itself a separate and distinct decision of 'independent procedural significance' even though the board may, after reopening, give the registrant the same classification as previously held. Robertson v. United States, supra. The board cannot actually determine the claim on the merits, decide not to reclassify the registrant, and then label its action a determination not to reopen, thereby denying the registrant precious appearance and appeal rights. *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967)."

B. The III-A Claim.

At all times concerned the regulations provided for two kinds of III-A claims: fatherhood, and registrants whose dependents would suffer extreme hardship. 32 C.F.R. § 1622.30 [Appendix C hereinafter].

In 1964 petitioner was in Class III-A by reason of fatherhood. His wife left, with the child, and he was reclassified in Class I-A.

On March 4, 1968 he presented a prima facie case that he was now the sole support of his mother and younger brother, as well as contributing to the support of his daughter [Ex. 60]. No effort was made by the local board to rebut or process his claim; he was processed for induction as a delinquent [Ex. 66]. His claim should have been duly processed. Failure to do so was a denial of due process.

Howze v. *United States,* 9 Cir., 409 F.2d 27, 28;
Petrie v. *United States,* 9 Cir., 407 F.2d 267, 281.

C. The Delinquency Processing.

On April 12, 1967 petitioner was declared a delinquent for failure to appear at the armed forces physical examination [Ex. 11, 40]. He was ordered to report for induction *as a delinquent* [Ex. 41]. His file was then sent to the State Director for prosecution [Ex. 48]. As he pointed out in his letter of February 28, 1968 he had not been getting his mail [Ex. 57] and gave as the reason that it had been "deliberately withheld."

In any event it is urged that this Court's decision in *Gutknecht* v. *United States,* No. 71, October Term 1969, January 26, 1970, 2 SSLR 3373 applies.

Petitioner's rights to due process were thus violated.

CONCLUSION

For the above given reasons certiorari should be granted and the judgment should be reversed.

Respectfully,

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June 17, 1970.

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
SPENCER H. ROBLEY, JR.,
Defendant-Appellant.

No. 24,224

[March 3, 1970]

Appeal from the United States District Court
for the Central District of California

Before: DUNIWAY, HUFSTEDLER and WRIGHT, Circuit Judges

PER CURIAM:

Robley was convicted of violating 50 U.S.C.App. § 462. The two points that he makes are answered adversely to him by prior decisions of this court.

1. Failure to reopen his classification and reclassify him III-A. He sent the Board some information, but did not ask for a reclassification or assert in any way that he should be reclassified. *United States. v. Weldon,* 9 Cir., 1969, ... F.2d ..... (No. 23,420, December 29, 1969); *Taylor v. United States,* 9 Cir., 1960, 285 F.2d 703; *Shaw v. United States,* 9 Cir., 1959, 264 F.2d 118.

2. Failure to reclassify him as a conscientious objector. His request was filed after he refused induction. This was too late, *Straight v. United States,* 9 Cir., 1969,

413 F.2d 263; *Palmer v. United States*, 9 Cir., 1968, 401 F.2d 226. *Cf. Blades v. United States*, 9 Cir., 1969, 407 F.2d 1397; *Ehlert v. United States*, 9 Cir., 1970, ... F.2d ....., (No. 21930 *in banc*, February 2, 1970).

Affirmed.

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
SPENCER H. ROBLEY, JR.,
Appellant.

No. 24,224

Order Denying Petition for Rehearing

(May 18, 1970)

Before: Circuit Judges.

The petition for rehearing is denied.

APPENDIX C

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act. 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

> "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 1625.2 of the Selective Regulations (32 C.F.R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

> *"When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided*, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

1622.30 Class III-A: Registrant with a Child or Children; and Registrant Deferred by Reason of Extreme Hardship to Dependents.—(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants

in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith: *Provided,* That a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.

(c) (1) The term "child" as used in this section shall include a legitimate or an illegitimate child from the date of its conception, a child legally adopted, a stepchild, a foster child, and a person who is supported in good faith by the registrant in a relationship similar to that of parent and child but shall not include any person 18 years of age or over unless he is physically or mentally handicapped.

(2) As used in this section, the term "physician" means a registrant who has received from a school, college, university, or similar institution of learning the degree of doctor of medicine or the degree of bachelor of medicine, the term "dentist" means a registrant who has likewise received the degree of doctor of dental surgery or the degree of dental medicine, and the term "veterinarian" means a registrant who has likewise received the degree

of doctor of veterinary surgery or the degree of doctor of veterinary medicine.

(3) No registrant shall be placed in Class III-A under paragraph (a) of this section because he has a child which is not yet born unless prior to the time the local board mails him an order to report for induction which is not subsequently cancelled there is filed with the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery and the evidence upon which his positive diagnosis of pregnancy is based.

(d) In the consideration of a dependency claim, any payments of allowances which are payable by the United States to the dependents of persons serving in the Armed Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the grounds for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 261

SPENCER H. ROBLEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a non-jury trial, petitioner was convicted in the United States District Court for the Central District of California of refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (1 R. 2–4, 30).[1] On January 13, 1969, he was sentenced to three years' imprisonment (1 R. 31). The court of appeals affirmed (Pet. App. A1–A2).

In March 1964, petitioner submitted to his local Selective Service board a completed questionnaire in which he stated that he was a conscientious objector

[1] "1 R." and "2 R." refer to the two-volume transcript of record. "S.S.F." refers to petitioner's Selective Service file (a government trial exhibit), a copy of which is on file in the Clerk's office.

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(1 R. 10; S.S.F. 7). The board promptly mailed him an SSS Form 150 (Special Form for Conscientious Objector) to fill out and submit in substantiation of his claim. Petitioner did not complete and return the form because after looking through it he doubted that he qualified for CO status (1 R. 10; 2 R. 28–29, 33; S.S.F. 11). A few months later the board mailed him a second SSS Form 150 but this also was not returned. Thereafter, petitioner was classified III–A (deferred for dependency) (S.S.F. 11).

In October 1966, petitioner's local board was notified by his wife that petitioner had deserted her and their infant daughter, that she did not know where he was and that she had not seen or heard from him for eleven months. The board then reclassified petitioner I–A and the following month ordered him to report for a pre-induction physical examination on December 5, 1966 (S.S.F. 11, 18). He failed to report as directed. In April 1967, following unsuccessful efforts by the board to ascertain petitioner's whereabouts, the board declared him delinquent for failing to report for the scheduled physical examination (S.S.F. 11, 26–38, 40). On May 17, 1967, in a directive mailed to him at his last known address, he was ordered to report for induction, as a delinquent, on June 13, 1967. He did not report (S.S.F. 11, 41, 48).

In July 1967, the local board reported petitioner to the United States Attorney for prosecution. Subsequently he was located by the F.B.I. and, at the F.B.I.'s suggestion, he communicated with the board and informed it of his current address. Further prose-

cutive action was thereupon discontinued (S.S.F. 11, 53). At the local board's request, petitioner submitted a completed current information questionnaire in February 1968 (S.S.F. 55–57). In March of that year, he requested the board by letter to "include in [his] file" that he was then the sole support of his widowed mother and of a younger brother and that he was contributing the support of his daughter. He did not ask to be reclassified or that his classification be reopened (S.S.F. 60).

On April 25, 1968, in a directive which referred to the induction order of May 17, 1967, and which reminded him of his "continuing duty to report for induction" under 32 C.F.R. 1642.15,[2] petitioner was ordered to report for induction on April 30, 1968 (S.S.F. 65).[3] He did not report. On June 17, 1968, in a similar order, he was again directed to report for induction, on June 25, 1968 (S.S.F. 72). On the latter date he reported for but refused to submit to induction (2 R. 37–38; S.S.F. 73–75).

In October 1968, three and a half months later, petitioner for the first time filed with the local board an executed SSS Form 150 (2 R. 29–32).

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[2] 32 C.F.R. 1642.15 provides that "[r]egardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction (SSS Form 252) * * *, it shall thereafter be his continuing duty from day to day to report for induction * * *."

[3] The accompanying "Delivery List" (SSS Form 261) stated that petitioner was to be inducted as a "delinquent registrant" (S.S.F. 66).

1. Petitioner contends that he was denied due process by the failure of the local board to "process his claim" to a hardship deferment, based on his March 1968 letter advising the board that he was the sole support of his mother and a brother and that he was contributing to the support of his daughter (Pet. 14). This letter, however, was mailed after petitioner had been ordered to report for induction. It was not accompanied by any documentation or supporting letters to substantiate petitioner's assertions. In these circumstances, the board was precluded from reopening under 32 C.F.R. 1625.2, since petitioner's letter was not alone sufficient to warrant a finding that "there [had] been a change in the registrant's status resulting from circumstances over which the registrant had no control" (32 CFR 1625.2). Moreover, as the court below observed, since petitioner neither requested nor made any other claim to III–A reclassification (Pet. App. A1), there was no "claim" for the board to "process." *United States* v. *Weldon*, 422 F. 2d 800, 801 (C.A. 9); *United States* v. *Whitaker*, 395 F. 2d 664, 665–666 (C.A. 4); *Taylor* v. *United States*, 285 F. 2d 703, 704 (C.A. 9); *United States* v. *Simmons*, 213 F. 2d 901, 910–911 (C.A. 7), reversed on other grounds, 348 U.S. 397.

2. Petitioner also asserts here for the first time that the original order directing him to report for induction (*i.e.*, the order of May 17, 1967) was invalid because it was predicated on a declaration of delin-

quency (Pet. 15). He relies on this Court's decision in *Gutknecht* v. *United States,* 396 U.S. 295.[4] However, *Gutknecht* is clearly distinguishable. In that case, the registrant was declared delinquent for failure to maintain possession of his draft cards (396 U.S. at 298), and as a consequence of the declaration of delinquency was ordered to report for induction substantially sooner than he otherwise would have been (396 U.S. at 299, 317–318). Here, however, the declaration of delinquency was occasioned by petitioner's failure to report for a pre-induction physical examination. Since normally such examination directly precedes issuance of the order to report for induction and signifies that the scheduled induction is imminent, the contention here that issuance of the induction order was accelerated by the act for which petitioner was declared delinquent is wholly unfounded. In this connection, it is relevant to point out that the directive of June 17, 1968, which petitioner was charged with violating, though derivatively based on the order of May 17, 1967, was issued more than a year after that date.

3. Petitioner's claim to classification as a conscientious objector was allegedly rejected (Pet. 7) under 32

[4] *Gutknecht* was decided January 19, 1970, at which time the instant case was pending before the court of appeals. The decision below in this case was rendered March 3, 1970. Although petitioner petitioned the court of appeals for rehearing (Pet. App. A2), he did not then raise the issue he now seeks to litigate before this Court. (A copy of the petition is on file in the Clerk's office.)

C.F.R. 1625.2, which provides that a local board shall not reopen a registrant's classification after an induction notice has been sent, unless that board specifically finds that there has been a change in status resulting from circumstances over which he has no control. This provision has uniformly been interpreted as not allowing reopening unless the registrant's change in status occurred *after* receipt of the induction notice. Cf. *United States* v. *Kanner,* 416 F. 2d 522, 525 (C.A. 9); *Dugdale* v. *United States,* 389 F. 2d 482, 484 (C.A. 9). Here petitioner received from his local board not one, but two conscientious objector forms prior to the mailing of his induction notice and returned neither. Moreover, he made no claim to CO status even after receiving his orders to report. Indeed, it was not until several months *after refusing to submit to induction* that he first filed a completed SSS Form 150.

As we stated in our memorandum in *Posner* v. *United States,* No. 151, this Term, pp. 5–6, "[d]espite their disagreement on the late crystallization issue, the various courts of appeals are in accord that in this situation, when a timely claim is not made, exemption may be denied on that basis alone." Cf. *Straight* v. *United States,* 413 F. 2d 263, 264 (C.A. 9); *Blades* v. *United States,* 407 F. 2d 1397, 1399 (C.A. 9); *United States* v. *Stoppelman,* 406 F. 2d 127, 131–133 (C.A. 1), certiorari denied, 395 U.S. 981. We recognize, however, that there is presently pending before this Court in *Ehlert* v. *United States,*

No. 120, this Term,[5] the issue whether the maturation of conscientious objector beliefs after the receipt of an induction notice constitutes a circumstance beyond the control of the registrant entitling him to reopening. While in our view, that issue is not presented by this petition for the reason stated above, the Court may wish to defer action here pending its decision in *Ehlert*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

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[5] Petitioner's contention that Congress, in creating the conscientious objector classification, "nowhere, even by implication, set a deadline for its presentation" (Pet. 4), is based on a misreading of the dissent in *Ehlert*. The *Ehlert* dissent in fact expressed concern that a claim be timely made. It recognized that ~~["]the~~ enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion." Moreover, it observed that in evaluating a conscientious objector claim the board must consider whether the belief "[d]id * * * in fact crystallize after receiving notice of induction and thus constitute a *change* in status." (422 F. 2d at 339 and n. 3). See government's memorandum in *Posner* v. *United States*, *supra*, p. 6 n. 4, a copy of which has been furnished to counsel for petitioner.

U.S. GOVERNMENT PRINTING OFFICE: 1970